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The Honorable Michael Toerge
Chairman, Planning Commission
City of Newport Beach
3300 Newport Blvd.
Newport Beach, CA 92663

**Subject: Proposed Amendment to Wireless Telecommunications Facilities Ordinance (PA2012-057),
Code Amendment No. 2012-004**

Dear Chairman Toerge:

AT&T appreciates the opportunity to provide comments to the Planning Commission on the proposed amendment to the City of Newport Beach's (City) Wireless Telecommunications Facilities Ordinance. AT&T has been providing communications service in Southern California for over a hundred years and its affiliate has been providing wireless telecommunications services since the late 1980's. AT&T is eager to work with the City in its efforts to address concerns about placement of wireless facilities within the City.

AT&T is most concerned about aspects of the proposed amendments that would directly impact the ability of the wireless telecommunications industry to provide service to residents, businesses and visitors in Newport Beach, who rely on cellphones and other wireless devices in their daily lives. As you are no doubt aware, the proposed amendments would affect not only cellphones, but wireless data of all kinds (including audio signals, video signals, computer files, e-mail and data of all kinds that now use wireless transmission) are affected.

Over all, we believe the proposed amendments are overly specific and restrictive and could give rise to a host of future issues and problems that may require further ordinance modifications. For example, by providing unique definitions of terms like "base station" that deviate from specific federal law definitions and is but one component of a wireless facility under 47 U.S.C.A 332, the City risks running afoul of Section 332 protections, creating a prohibition on wireless service, and having the entire ordinance preempted. We recommend that the City instead treat wireless facilities more like other facilities and not regulate them. Below, we provide the applicable law and our specific concerns.

APPLICABLE LAW

The federal Telecommunications Act of 1996, 47 U.S.C.A. 151 et seq. (1996) regulates the deployment of wireless telecommunication service. Section 332(c)(3) gives the FCC certain authority that is exclusive and which preempts conflicting acts by state or local governments. Section 332(c)(3)(7) of the Act, while recognizing that local zoning authority is preserved, requires that local regulation not "unreasonably discriminate among providers of functionally equivalent services" and not "prohibit or have the effect of prohibiting the provision of personal wireless services."

Also recently enacted at the federal level, section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (47 U.S.C.A. § 1455(a)(2012)) provides that “a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” An “eligible facilities request” includes any request to modify an existing wireless tower or base station that involves collocation, removal, or replacement of transmission equipment. (Id.)

California state law also impacts placement of communication facilities within the public rights-of-way. Wireless and wireline carriers, as “telephone corporations,” have access rights to the public rights-of-way under Section 7901 of the California Public Utilities Code. A telephone corporation enjoys a vested right under Section 7901 to construct “telephone lines” and “necessary fixtures” “along and upon any public road.” California courts have long upheld this vested right to enter and use the public right-of-way.

In our view, the City possesses only a limited right to curtail the rights of telephone corporations under Section 7901. Section 7901.1(a) grants to the City only the ability to exercise “reasonable control as to the time, place and manner in which roads . . . are accessed.” Section 7901.1(b) provides that any municipal regulations “at a minimum, be applied to all entities in an equivalent manner,” thereby imposing a duty on the City to regulate in a non-discriminatory manner.

COMMENTS

As mentioned above, some of the provisions of the proposed amendments might constitute a prohibition of services under the federal Telecommunications Act. A number of the special requirements outlined in the Proposed Ordinance relating to wireless facilities placed in the public rights-of-way also appear to go well beyond the regulation permitted under Section 7901 of the Public Utility Code. Finally, we believe the proposed amendment conflicts with Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012. We identify some of the problematic provisions in more detail below.

Section 20.49.030 – Definitions

Base Station – The definition provided by City for “Base Station” is too restrictive and should not exclude DAS. Alternatively, we request the City’s language be modified more broadly to: “A Telecom Facility installed and operated by the Telecom Operator for signal transmission and reception.” The second sentence regarding antennas and DAS should be excluded from this definition.

Wireless Tower – Only the first sentence should apply. The remaining part of this definition inappropriately narrows the meaning of a wireless tower.

Section 20.49.040 – Available Technology

We do not believe this section is relevant. It attempts to codify the choice of technology used in sites. Although it does not explicitly state various technologies, it is inappropriate for the City to dictate what technology carriers select. For example, under this section, the City could insist that AT&T use DAS or any other “efficient, diminutive, and least obtrusive available technology” as opposed to a Macro Site.

Section 20.49.050 (B) - Prohibited Locations

We do not believe the City should impose blanket prohibitions on certain locations within the City’s Jurisdiction. What if the only available site is in a prohibited location? Carriers should have the

opportunity to at least attempt or work with the City to build a site at any location in the City if that is the only available means.

Section 20.49.060 – General Development and Design Standards (Also in Same Section Subsection (E))

Some of the stealthing standards and guidelines in this section and referenced in other sections may not be feasible, such as using surrounding vegetation and structures to camouflage a site. To the extent that such techniques need only be considered but are not required to be implemented, this section may be workable. However, if the City intends to mandate these guidelines and standards, that is problematic, as natural vegetation and structures can impair or block RF signals.

Section 20.49.060 (C) - Height

There are maximum height standards which may not work from an RF perspective, although we recognize that variances can be granted.

Section 20.49.060 (D) - Setback

The setback requirement for a wireless tower is 110% of the height of the tower including the antennas or enclosures. Newport Beach is a densely populated area and this setback requirement could effectively prohibit new wireless towers as this requirement may be very difficult to meet in many parts of the City.

Section 20.49.100 – Modification of Existing Telecom Facilities

This section appears to be an attempt to codify Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012. Under Section 6409(a) any facility modification that falls under and complies with Section 6409 must be approved by the City. Section 6409 is not discretionary. We do not believe the City should set standards and definitions that restrict or define the applicability of the Federal Statute, as it appears to do in this section. It is appropriate for the City to describe how it will comply, but it should not attempt to redefine the elements of Section 6409.

We hope the City finds these comments to the proposed amendment helpful. We welcome the opportunity to work with the City staff to discuss our legal and practical concerns and to develop solutions amenable to both AT&T and the City.

Sincerely,



Kyla C. Powell

Cc: Bradley Hillgren, Vice Chair, City of Newport Beach Planning Commission
Members, City of Newport Beach Planning Commission
Janet Johnson Brown, Associate Planner